MALAYAN BANKING BERHAD v. YAP SENG KEE & ORS.

[O.C.J. (Yusoff Mohamed J.) July 26, 1987]

[Johore Bahru – Civil Suit Nos. 592 & 593 of 1977]

Contract – Guarantees provided by directors for banking facilities granted to their companies – Companies unable to pay debts due to bank – Claim on guarantees against guarantors – Sums of money paid by receiver not credited to companies' accounts – Interest rate not specified in guarantees – Defence of variation – Bank's right of variation – Whether variation absolves guarantors from liability – Contracts Act 1950, s. 86.

Banking – Banking facilities granted to companies – Guarantees provided by directors – Claim on guarantees against guarantors – Defence of variation – Bank's right of variation – Contracts Act 1950, s. 86.

The three defendants in these consolidated actions were guarantors for banking facilities granted by the plaintiff bank to two companies (Seiko and Mandarin) in which they were directors.

Seiko owed the bank $1,762,266.19 as at June 28, 1977, and Mandarin owed $2,049,064.73 as at July 6, 1977. Both companies were unable to pay their debts to the bank and have been liquidated. On June 3, 1985, the receiver of Seiko sent a sum of $399,912.94 to the bank. On July 6, 1977, the receiver of Mandarin sent a sum of $329,388.65 to the bank. These two sums were kept in suspense accounts and were not credited to the respective accounts of Seiko and Mandarin. The bank now proceeds against the 2nd defendant (Yap Seng Hock) and the 3rd defendant (Yee Soo We @ You Su We) on their guarantees. They do not deny the debts but seek to avoid the guarantees which did not specify the rate of interest payable.

The defendants' main contentions are (1) the guarantors gave their guarantees on the basis of the approval letter and conditional upon the security being obtained so that the money be disbursed in accordance with such approval; (2) assuming the variation did take place, whether such variation could be considered being one which absolved the defendants; and (3) whether the variation is such that it goes to the root of the contract and therefore the guarantees fail.

Held: (1) both the defendants as directors had knowledge of the variations made by the bank which were granted for their benefit, and neither the companies nor the defendants were prejudiced by these variations;

(2) the two clauses of the guarantees were sufficient for the bank to vary the securities which had been agreed to by the defendants or to grant whatever indulgence to the companies without obtaining prior consent of the defendants. These two clauses, although contrary to section 86 of the Contract Act, are valid and binding on the guarantors;

(3) the defendants were therefore liable as guarantors for the respective debts of Seiko and Mandarin as at the dates of demand served upon them, with proper reduction of the amounts paid by the receiver;

(4) an interest of 5% p.a. (as conceded by counsel for the bank) is payable on the guarantees;

(5) costs to the bank to be taxed.

Cases referred to:

(1) *Citibank N.A.* v. *Ooi Boon Leong* [1981] 1 M.L.J. 282.

(2) *Ooi Boon Leong & Ors.* v. *Citibank N.A.* [1984] 1 M.L.J. 222.

(3) *Malayan Banking Bhd.* v. *Lim Chee Leng & Ors.* [1985] 1 M.L.J. 75.

CIVIL SUIT.

James Puthucheary for the plaintiff.
K.S. Narayanan for the 2nd defendant.
Choo Keng Yong for the 3rd defendant.

Cur. Adv. Vult.

Yusoff Mohamed J.: These two actions, Civil Suit Nos. 592/77 and 593/77, are consolidated. The three defendants in both actions stood as guarantors for banking facilities granted by the plaintiff bank to two companies, Seiko Electronics Industries Sdn. Bhd. and Mandarin Textiles Sdn. Bhd., in which all the three defendants and some others were directors. Both companies were unable to satisfy their debts to the plaintiff and have been under receivership. The plaintiff seeks to enforce payment on the defendants upon their guarantees. As the 1st defendant has not been served with the writs, the plaintiff now proceeds against both the 2nd and 3rd defendants only. The defendants refused to pay. They do not deny the debts but seek to avoid the guarantees.

The defendants' main contentions are, firstly, the guarantors gave their guarantees on the basis of the approval letter and conditional upon the security being obtained so that the money be disbursed in accordance with such approval.

Secondly, assuming the variation did take place whether such variation could be considered as being one which absolved the defendants and, thirdly, whether the variation is such that it goes to the root of the contract and therefore the guarantees fail.

It is common ground that for the purpose of providing working capital to Seiko Electronics Industries (Seiko) and for the purpose of establishing a factory by Mandarin Textiles (Mandarin), the plaintiff issued letters of approval for those facilities granted to the two companies. These were accepted by the respective directors of the

companies. In respect of Seiko by letter dated December 11, 1973 (AB1N @ 1 & 2), a facility for $2 million was granted on these terms:

Security:

1) 2nd fixed charge on the company's fixed assets valued at about $5,000,000.00.

2) 1st floating charge on the company's movable assets including stock-in-trade and book debts.

3) Joint and several personal guarantees for $2,000,000.00 from Yap Seng Kee, Yap Seng Hock, Yeoh Soo Wee, C.Y. Nan and Wu Shyh Juh.

Release of facilities:

L/C $300,000.00 and T/R $300,000.00 may be made available when:

(i) paid-up capital has been certified by company's auditor to be not less than $2.5 million.

(ii) The said directors' guarantee has been properly executed.

In respect of Mandarin, the approval was granted on December 28, 1973, for facilities totalling $1.8 million and the terms were (AB2N @ 3):

Security:

(i) 1st floating charge on all current assets such as stock-in-trade, raw materials and book debts.

(ii) 2nd fixed charge over the company's entire fixed assets.

(iii) Joint and several guarantees of the main directors, Encik Yap Seng Kee, Yap Seng Hock, Yee Soo Wee, Roder Chi Ban Shen and Nam Chiao Yung.

In support of his argument, Mr. Narayanan, on behalf of the 2nd defendant, highlighted the following evidence.

In the case of Seiko, guarantees by the defendants were executed on December 15, 1973 (AB1N @ 5) and debenture of loan agreement on January 15, 1974 (ABIN @ 20 and 22). At this stage, an overdraft facility of $200,000 was already taken out by Seiko on December 31, 1973 (AB1N @ 144). By the time the charge on Seiko's assets was registered on May 24, 1977 (AB1N @ 112), the entire sum of facilities granted to Seiko was utilized as shown by letters of credits and trust receipts issued by the plaintiff (AB1N @ 167 to 189).

In the case of Mandarin, it is said that the facts were more apprehensive. The guarantee was signed on March 8, 1974 (AB2N @ 7-9) and before that date a sum of $48,608.62 was already released as an overdraft to Mandarin on February 27, 1974 (AB2N @ 128). Again before the debenture was signed on April 12, 1975 (AB2N @ 68 to 84), the entire trust receipt facility amounting to approximately $1.4 million was released by the plaintiff (AB2N @ 152 to 170). The charge on Mandarin's assets as required by the letter of approval was only created on May 26, 1977 (AB2N @ 91).

On the authority of *Citibank NA* v. *Ooi Boon Leong*,[1] it can be accepted that these were conditional guarantees. That being so, various disbursements of the facilities granted to both companies were not in accordance with the terms of the letters of approval. These constitute variations on the part of the plaintiff.

Much arguments have been advanced by Mr. Narayanan on these variations contending that they were unilaterally made without the consent of the defendants and therefore contrary to section 86 of the Contracts Act 1950. Under those circumstances, he submitted that the guarantees failed.

Of paramount importance in these arguments is the fact that both defendants were the directors of the companies at the time when those facilities were disbursed. The 2nd defendant was an active director and he had on occasions met PW.1, the general manager of the plaintiff's company, about these loans. Both the directors had knowledge of these series of variations made by the plaintiff which were granted for their benefit. To this end, in my view, neither the companies nor the defendants were prejudiced by these variations, so that they are discharged from their liabilities.

On the contention that the variations were of such a nature that prior consent of the defendants had not been obtained, it is imperative to examine the guarantee documents (AB1N @ 3 and AB2N @ 7). Both documents have similar provisions.

Clause 5(ii) allows the plaintiff to vary, release or modify the securities without exonerating the defendants. It is in these terms:

"5. This guarantee shall be without prejudice to and shall not be affected nor shall we or any of us be released or exonerated by any of the matters following:

(ii) the variation exchange renewal release or modification of any such securities or the refusal or neglect to complete enforce or assign any judgment specialty or other security or instrument negotiable or otherwise and whether satisfied by payment or not;"

Clause 5(iii) allows the plaintiff to grant other indulgence to the companies without consent of the guarantors. The provision reads:

"5(iii) any time given or extended to the customer and/or any other person or persons including any of ourselves and the parties to any negotiable or other security instrument guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the customer and/or any other person or persons whether with or without consent or notice to me/us;"

These two provisions are, in my view, sufficient for the plaintiff to vary the securities which had been agreed by the defendants or to grant whatever indulgence to the companies without obtaining prior consent of the defendants.

These clauses of the guarantees, although contrary to section 86 of the Contracts Act, are valid – see *Ooi Boon Leong & Others* v. *Citibank N.A.*[2] and therefore binding on the guarantors.

In this situation, there is no breach of the terms of the contract between the parties. The question whether the breach goes to the root of the contract does not therefore arise. This contention is only relevant in order to determine whether the guarantee is thereby wholly discharged by the breach.

Now, the measure of liability. By letter of demand to the defendants dated June 28, 1977 (AB1N @ 107), the sum owed by Seiko to the plaintiff was $1,762,266.19. From the recovery of assets belonging to Seiko, the receiver transmitted a sum of $399,912.94 to the plaintiff on June 3, 1985. This sum was not credited to Seiko towards reduction of the amount owed by them but instead it was kept in a suspense account accruing no interest to Seiko. Under cross-examination, the plaintiff's general manager (PW.1) agreed that this sum should properly be used towards the payment of Seiko's debt.

In respect of Mandarin, by letter of demand dated July 6, 1977 (AB2N @ 107), a sum of $2,049,064.73 was claimed from the defendants. Similarly, an amount of $329,388.65 was received earlier by the plaintiff from the receiver from recovery of Mandarin assets. This amount was not credited to Mandarin's account which PW.1 also agreed that it should have been.

It is clear that these two sums of money rightly belonged to Seiko and Mandarin respectively and should properly be credited to their accounts to reduce their debts.

Much argument was also advanced on interest payable by the defendants for the sums due under these guarantees. The documents of guarantee themselves do not specify the rate of interest payable. In both guarantees, clause 4 is in these terms.

"4. This guarantee shall be a continuing guarantee to you to the extent of Dollars ... only with interest on the sum claimable from us at the rate of – per $100 per mensem from the date of our receiving demand ..."

In evidence, the plaintiff's solicitor who drafted the documents, DW.2, said that he did not receive instruction on the rate of interest to be charged for the guarantees. On the other hand, the plaintiff's operation officer, PW.2, said that the rate was left blank because the bank could vary it and the plaintiff's branch manager said that the prevailing rate of interest for loans in 1974 was between 9 and 10 per cent per annum.

On this evidence, the plaintiff's counsel urged that as the rate of interest was not specified, there was an ambiguity and relying on *Malayan Banking Bhd.* v. *Lim Chee Leng & Ors.*[3] the court should order the usual rate.

The defendant's counsel argued that *Lim Ghee Leng's* case was a claim resting on trust receipts where money was borrowed and there was therefore a rate of interest chargeable. He distinguished that in guarantees no money was borrowed, that it was an undertaking to pay a certain amount of interest on somebody else's loan and there can be no interest at all.

I regret to say, although the defendant's counsel laboured hard to convince the court otherwise, I find that the facts are against him. Clause 4 of the agreement provides for the interest chargeable. The parties have agreed to a rate of interest though not specially provided. There is in my view an ambiguity as held in *Lim Chee Leng's* case. In the absence of the rate agreed by the parties, it was held there that the usual rate of interest chargeable for the particular transaction should apply. In this

case, the usual rate of interest for loans prevailing in 1974 was 9% – 10% p.a. The plaintiff's counsel, however, conceded that a 5% interest in this respect is reasonable. I agree that an interest of 5% in this case was reasonably payable upon these guarantees.

I find that the remaining arguments by the defendants have no merits and I hold that the defendants, in these circumstances, are liable as guarantors for the respective debts of Seiko and Mandarin as at the dates of demand served upon them, with proper reduction of the amounts paid by the receiver into the companies' respective accounts to be assessed before the Senior Assistant Registrar. As has been conceded earlier, the amounts recoverable from the defendants are limited to the sums specified in the guarantee documents.

Costs to the plaintiff to be taxed.

Order accordingly.

Solicitors: *Rashid & Lee; Ng Ek Teong & Partners; H.H. Long & Co.*

PUBLIC PROSECUTOR v. LOO CHANG HOCK

[A.Cr.J. (Zakaria Yatim J.) July 14, 1987]

[Kuala Lumpur – Selangor Criminal Appeals No. 206 & 207 of 1985]

Criminal Procedure – Sentencing – Inadequacy of sentences – Two serious offences committed within period of three days – Different types of punishment – Which is most appropriate – Deterrent sentence most appropriate.

In this case, two appeals filed by the Public Prosecutor were heard together.

In both appeals, the accused was the same person. In each case, the accused was charged with an offence punishable under section 457 of the Penal Code.

In both cases, the accused pleaded guilty in the Magistrate's Court and in respect of Criminal Appeal No. 207 of 1985, he was sentenced to six months' imprisonment from the date of sentence and a fine of $3,000 (in default six months' imprisonment). In respect of Criminal Appeal No. 206 of 1985, he was sentenced to six months' imprisonment from the date of sentence and a fine of $2,500 (in default five months' imprisonment).

The Public Prosecutor appealed against the inadequacy of sentence in both cases.

Held, allowing the appeal: (1) this was a proper case for the court to interfere with the sentences passed by the magistrate;

(2) in both these cases a retributive punishment had no application. Preventive punishment too was not an appropriate punishment. In view of the fact that the respondent had committed two serious offences within a period of three days, reformative punishment was not an appropriate punishment. The proper punishment was a deterrent punishment;

(3) a deterrent sentence was therefore appropriate since there was clearly premeditation;

(4) having taken into consideration the amount of goods stolen, the *modus operandi* of the respondent in committing the offences and the other relevant factors, the respondent should be sentenced to two years' imprisonment in respect of the first case and two years' imprisonment in respect of the second case. Both sentences were to run concurrently;

(5) in addition to the custodial sentences, it was also necessary to impose a fine in respect of each of the offences. The respondent was fined $5,000 in respect of each offence (in default one year's imprisonment).

Cases referred to:

(1) *Chan Sit Hoong* v. *Public Prosecutor* [1975] 1 M.L.J. 261, 262.
(2) *R.* v. *Ball* (1952) 35 Cr. App. R. 164.
(3) *R.* v. *Sargeant* (1974) 60 Cr. App. R. 74.
(4) *Zakariya bin Musa* v. *Public Prosecutor* [1985] 2 M.L.J. 221.

CRIMINAL APPEAL.

P.L. Tan (Deputy Public Prosecutor) for the appellant.

C. Sequerah for the respondent.

Zakaria Yatim J. (delivering oral judgment) : There are two appeals filed by the Public Prosecutor against the respondent *vide* Selangor Criminal Appeal No. 206/1985 and Selangor Criminal Appeal No. 207/1985. The appeals are against the inadequacy of sentences passed by the court below.

For convenience, the two appeals are heard together since the two cases are quite similar and the respondent is the same person.

In Criminal Appeal No. 207 of 1985, the respondent was charged in the Magistrate's Court in the following words:

"That you both jointly between 2.00 a.m. on 11.12.84 and 7.00 a.m. on 11.12.84 at Syarikat Ken Ken Auto. Acc. No. 104 Jalan SS. 15/4 Subang Jaya, in the District of Petaling Jaya, in the State of Selangor, in furtherance of a common intention as defined under section 34 of the Penal